United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of personal service

75-2136

To be argued by
HERBERT G. JOHNSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2136

SEYMOUR KLONER,
Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Corrected **BRIEF FOR THE APPELLEE**

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BRIEF FOR THE APPELLEE

Preliminary Statement

Seymour Kloner appeals from an order entered on September 22, 1975, in the United States District Court for the Eastern District of New York (The Honorable Leo F. Rayfiel, Senior District Judge) denying three consolidated post-conviction *pro se* applications for habeas corpus relief.[1] Petitioner is represented on this appeal by The Legal Aid Society.[2]

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[1] Between July and September, 1975, petitioner filed no less than five separate petitions and affidavits in the district court. The contents of those petitions will be treated in greater detail at a later point in this brief. Suffice it to say that the district court apportioned the several claims of petitioner among three separate civil files, i.e., 75 C 1212, 75 C 1379 and 75 C 1395. By order dated December 4, 1975, this Court (per Lumbard, Friendly, and Mulligan, *C.J.J.*) directed that petitioner's three separate appeals be consolidated "for purposes of appeal." The Government's Appendix, references to which will be preceded by the letter "A", contains the relevant portions of the district court files as well as the docket sheets.

[2] The record is not entirely clear that petitioner requested the appointment of counsel. Nevertheless, by order dated December

[Footnote continued on following page]

Appellant was previously convicted on November 19, 1971, upon his plea of guilty to the second count of a two count indictment charging that he stole nearly $2,000 from a bank in violation of 18 U.S.C. § 2113(b) (A 40-42). Count One of the indictment, which was dismissed when appellant was sentenced, charged that he had stolen the money "by force, violence and intimidation" in violation of § 2113(a). Appellant was sentenced by Judge Rayfiel, who also took appellant's plea, to a prison term of five years subject to the immediate parole provisions of 18 U.S.C. § 4208(a)(2). Appellant was paroled in September, 1973. Thereafter, in early 1975, appellant's parole was revoked. Previously, he had been arrested by local authorities on two separate charges of larceny.[3] During the pendency of proceedings in the district court, appellant was incarcerated in the Queens House of Detention, a New York City facility. Currently, though, he is in federal custody.

Appellant Kloner's three applications to the district court, taken together and liberally construed, raised five issues. First, he challenged the validity of proceedings by which his parole following service of a portion of his sentence under his original criminal conviction was revoked by the United States Board of Parole. Second, he asserted that while incarcerated at the Queens House of Detention he was unable fully to observe the tenets of his

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16, 1975, this Court (per Feinberg, *C.J.*) deemed the December 4 order (*supra*, n. 1) as having granted petitioner's "motion . . . for the assignment of counsel." Despite the appointment of counsel, however, petitioner continues to submit *pro se* materials in both the district court (A 56, et seq.) and the Court of Appeals (A 52).

[3] Those arrests eventually ripened into convictions. On November 6, 1975, appellant was sentenced in Kings County Supreme Court to a prison term of two to four years. On November 11, 1975, he was sentenced in Queens County Supreme Court to a term of one and a half to three years. Both sentences were designated to run concurrently with appellant's federal sentence (A 53).

religion and did not receive adequate medical care. Third, he requested that the Bureau of Prisons release him on furlough. Finally, he alleged that his attorney in his original criminal proceeding had told him that he had arranged a sentence with the Assistant United States Attorney providing for two years probation, which sentence was not honored; that he did not appeal because his attorney had not advised him of that right; and the attorney who represented him at his sentencing was someone he had not met before that day.

Through his court-appointed appellate counsel appellant has substantially revamped his claims. His claims in the district court respecting the parole revocation have been winnowed to the sole argument that Judge Rayfiel neglected to conduct a *de novo* review of the parole revocation proceedings.[4] His petition respecting a furlough has been abandoned as have his assertions respecting improper medical treatment and the alleged refusal of the officials in charge of Queens House of Detention to allow him to practice his religion.[5]

Appellant's main contention, a new claim, is that this Court reverse the orders below and *sua sponte* direct the district court to enter an order vacating the judgment of

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[4] Counsel for appellant has recently been advised that confidential materials of the Board of Parole were submitted to Judge Rayfiel. We anticipate, therefore, that upon review of those materials, this argument will not be pressed.

[5] We say "abandoned" because, although counsel mentions, in the argument portion of appellant's brief (Br. 10), the alleged facts underlying the claims respecting medical treatment and religious observance, counsel's argument amounts to no more than a request that appellant be permitted to replead a claim for damages under 42 U.S.C. § 1983. In no sense, however, does appellant claim that habeas corpus relief was improperly withheld; as, of course, it was not. See, in addition to *United States* v. *Huss*, 520 F.2d 598 (2d Cir. 1975) cited by Judge Rayfiel (A 5), *Kahane* v. *Carlson*, — F.2d — (2d Cir. slip op. 715; decided November 26, 1975).

conviction and plea of guilty in the appellant's original criminal case, or alternatively remand the case to the district court for a hearing upon the question of the validity of the plea. Appellant claims that the plea minutes fail to establish that the plea was entered voluntarily, with knowledge of the consequences of the plea and also, that the minutes of the plea fail to establish a factual basis for the plea as, it is argued, required by Rule 11, Fed. R. Crim. P.

Statement of Facts

On the same day that he robbed the Pioneer Savings and Loan Association on Pennsylvania Avenue in Brooklyn (February 19, 1971) appellant Kloner was arrested by New York City police officers. He was taken into custody at his home and gave the officers nearly all of the money that he had robbed.[6] His confession to agents of the Federal Bureau of Investigation that same day gave a detailed account of his actions in the bank, including his use of a toy gun, as well as his motive; he needed money (A 82-83).

Thereafter, following his arraignment, appellant was indicted (as previously described; *supra* at 2; see A 40-41). Counsel, an experienced criminal defense attorney, was appointed to represent him.[7] Kloner initially pled not guilty but on September 2, 1971, represented by counsel,

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[6] This information comes from appellant's confession of February 19th to the Federal Bureau of Investigation. We have included in the Government's Appendix a copy of that confession (A 82-83), as well as additional material technically *de hors* the record because appellant has, in effect, converted this appellate proceeding into an original proceeding (see Point I, *infra*). We note, also, that appellant has never challenged the taking of his confession.

[7] Aaron Schacher's name has been misspelled throughout; i.e. "Sacher", "Schachter", "Schaker", etc.

he withdrew his plea of not guilty and pled guilty to the second and lesser count of the indictment.

As previously noted, appellant has raised on this appeal a question which was never presented to the district court. Counsel for appellant, following assignment, ordered the minutes of appellant's plea and sentencing transcribed. Based upon counsel's review of those transcripts it is now claimed that Rule 11, Fed. R. Crim. P., was not complied with and, accordingly, pursuant to *McCarthy* v. *United States*, 394 U.S. 459 (1969) that appellant's conviction must be automatically vacated. We proceed, therefore, to examine the minutes of the plea and sentence.

Having previously entered a plea of not guilty, Kloner appeared on September 2, 1971, with Mr. Schacher before Judge Rayfiel and stated that he wished to withdraw that plea and enter a plea of guilty to Count Two of the indictment (P 3).[8] The Court read that count aloud to Kloner and advised him that he had a right to a jury trial if he wished one (P 3-4). Kloner was told the maximum sentence which might be imposed (P 4-5). The Court twice asked Kloner whether his plea was voluntary and Kloner answered that it was (P 5). After inquiring further as to Kloner's background, schooling and whether he had ever undergone psychiatric care, the Court asked him whether he had committed the act charged (P 6-7). Kloner answered that he had and that he had confessed to the Federal Bureau of Investigation (P 7). Kloner's attorney emphasized that his client had made a full confession (P 7).

On November 19, 1971, Kloner appeared before Judge Rayfiel for sentencing (S 1). He stated on the record

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[8] Counsel for appellant has reproduced in an appendix, marked off by lettered tabs, the minutes of the plea and sentence (Tabs C and D, respectively). Page references to the plea minutes will be preceded by the letter "P", and the letter "S" will preface page references to the sentencing minutes.

that he had no objection to Meyer Chazanov, Esq. (whom he had apparently not met before that morning) appearing as his counsel at that proceeding in place of Mr. Schacher (S 3). After Mr. Chazanov had described the circumstances of the crime and had spoken in his behalf, Kloner addressed the Court, during which time he said that the gun he had used during the crime had been a plastic toy pistol (S 3-5). Judge Rayfiel, stating that he was being much more lenient than the panel of judges with whom he had discussed the case had recommended, sentenced Kloner to a five-year term of imprisonment under 18 U.S.C. § 4208(a)(2) (S 4-6). On motion of the Government, Count One of the indictment was then dismissed (S 6).

If there had been any question in Kloner's mind at the plea or at sentencing as to whether or not he was guilty because he had, in fact, committed the bank robbery, it was certainly resolved when, two months after he was sentenced, he wrote the Assistant United States Attorney who had handled the case that "the act that I committed and that I am confined for was done during the only time I was ever unemployed in my life" (A 79-80). In September, 1972, nearly one year later, Kloner wrote again to the same Assistant requesting that he make a recommendation of leniency to the Parole Board. Kloner stressed he had been rehabilitated. He did not suggest, in the least, that he had not committed the crime, nor in any other way seek to impugn the validity of his plea of guilty.[9]

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[9] In his petition of August 19, 1975 (A 37), Kloner asserts that a "deal" had been "worked out" between the Assistant and his attorney whereby he would receive a sentence of two years' probation. This patently insufficient claim, *see Dalli* v. *United States*, 491 F.2d 758 (2d Cir. 1974), is alluded to again in one of the several documents Kloner has submitted to this Court (A 43, 48) in which Kloner states that he wrote letters to the Assistant, implying that he questioned the Assistant on the so-called "deal." Examination of the letters (A 79-81) will show that implication to be false. Counsel, we note, has not pressed this particular claim on appellant's behalf.

On September 17, 1973, Kloner was released on parole after having served 22 months (A 1). However, on January 24, 1975, he was arrested and charged with violating parole (A 53). A parole revocation hearing was held at the Federal House of Detention in New York City on February 24, 1975 (A 54). Four charges against Kloner were specified and heard at that hearing: (1) Failure to report a change of address to his parole officer, (2) leaving the area of parole supervision without permission and (3) and (4) two New York State grand larceny arrests while on parole. At the hearing, Kloner admitted the facts of the last three of these charges and also admitted that he had moved his residence (A 12 *et seq.*). He claimed, however, that his parole officer had known of his change of address and that, when he had learned after Kloner's return that Kloner had left the area of supervision on a "business-vacation", that parole officer had told Kloner he would not be held in violation for that item alone (A 14). The arrest charges were not considered at the hearing because they had not been adjudicated. Following the hearing, the Board of Parole made a finding that Kloner had violated parole and he was ordered incarcerated pending an institutional review in January 1977 (A 15). Kloner appealed to the Regional Director of the Board of Parole and to the National Appeals Board as provided by law but the decision revoking parole was affirmed at each appellate level (A 2).

Subsequent to his federal parole revocation, on March 31, 1975, Kloner was delivered on a writ to New York State authorities. In November, 1975, he was convicted in Supreme Court, Queens and Kings Counties, to two separate charges of grand larceny. He subsequently was sentenced on those charges and was returned to federal custody on December 12, 1975.

ARGUMENT

POINT I

This Court should not entertain appellant's claims asserted under *McCarthy* v. *United States*, 394 U.S. 459 and Rule 11 of the Federal Rules of Criminal Procedure because they were never presented to the district court; at most, the case should be remanded for further consideration by the district court upon a proper petition filed by appellant.

This Court and other Courts of Appeals have consistently refused to entertain claims raised for the first time on appeal. See *United States* v. *Indiviglio*, 352 F.2d 276, 279-280 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Luster*, 342 F.2d 763, 764 (6th Cir.), *cert. denied*, 382 U.S. 819 (1965); *Johnston* v. *United States*, 254 F.2d 239, 241 (8th Cir. 1958); *Morales* v. *United States*, 373 F.2d 527 (9th Cir. 1967) (per curiam); *Johnson* v. *Patterson*, 367 F.2d 268 (10th Cir. 1966) (per curiam). Indeed, this Court has recently refused to consider new claims respecting violations of rights which were unambiguously constitutional on appeals taken directly from the judgments of conviction. See *United States* v. *Natale*, — F.2d — (2d Cir. slip op. 793, 811; decided Nov. 28, 1975); *United States* v. *Rollins*, 522 F.2d 160 (2d Cir. 1975). Surely, even given the most liberal interpretation, appellant's mountain of petitions in the district court did not fairly raise the claim, now asserted on appeal, that Rule 11 was not complied with. No affirmative relief, therefore, should be given appellant by this Court. *See Eller* v. *United States*, 327 F.2d 639 (9th Cir. 1964); *Bush* v. *United States*, 347 F.2d 231 (6th Cir. 1965) (per curiam), *cert. denied*, 382 U.S. 995 (1966). Appellant's assertion that the district court should have ordered the minutes of the plea is pure sophistry; certainly, appellant's claim that he had not been advised of his right to appeal which, even if true,

would not have entitled him to relief (*see infra*, Point III, pp. 30-31), did not impose upon the district court the obligation of reviewing the plea minutes, much less ordering them to be transcribed.

This Court might also refuse to consider appellant's claims respecting Rule 11 because there has been no signed and verified application tendered by appellant or counsel. See 28 U.S.C. § 2242; cf. *United States* v. *Welton*, 439 F.2d 824, 826 (2d Cir.), *cert. denied*, 404 U.S. 859 (1971). This failure is of more than technical significance. With the exception of appellant's August 19 petition to vacate his *sentence* (A 37), *compare Natarelli* v. *United States*, 516 F.2d 149, 152 n. 4 (2d Cir. 1975), the remainder of his petitions challenge his current incarceration and conditions thereof, but do not attack the validity of his plea and conviction. In addition, despite the appointment of counsel (*supra*, n. 2), appellant continues to act *pro se* (e.g., A 52). There is, therefore, a serious question as to whether this appellant, who affirmed his guilt (A 79) following a moderate sentence upon reduced charges, would wish to see his plea vacated and the indictment reinstated. Considering that he committed two additional crimes (A 54) while out on parole, there is a substantial likelihood that he would receive a greater sentence even if he were permitted to replead to the same reduced charge. *Compare United States* v. *Navedo*, 516 F.2d 293, 298 (2d Cir. 1975) (Kaufman, *Ch.J.*, dissenting).

For these reasons, therefore, we question the wisdom of this Court considering, on the merits, appellant's claim raised by counsel in the brief on appeal. Nevertheless, we recognize the force of appellant's contention that *McCarthy* v. *United States*, *supra*, requires that compliance with Rule 11 must be shown on the record. *See Ferguson* v. *United States*, 513 F.2d 104 (2d Cir. 1975). While this apparent rule of *McCarthy* may be applicable to seasonably raised claims of noncompliance, we have urged (Point III, *infra* at pp. 19-33), that the *per se*

rule of *McCarthy* is not applicable in collateral proceedings; and further, that the claimed violation must be accompanied by some showing of prejudice and a claim of innocence.

Conversely, where the allegations of noncompliance are without factual support in the record, or have no firm legal footing, it would seem wasteful to remand the case to the district court for further proceedings, as appellant alternatively suggests (Br. 1, 10), when this Court could just as easily assess the record in light of counsel's arguments. *Compare O'Neil* v. *United States*, 486 F.2d 1034, 1036 (2d Cir. 1973). We believe, accordingly, that, to the extent that appellant's claims can be *rejected* based upon a review of the record—even though that record has only surfaced recently—they should be. However, it would seem inappropriate for this Court to grant appellant relief for reasons which were never advanced in the district court, upon documents which were never considered by the district court. Cf. *United States* v. *Antoine*, 434 F.2d 930 (2d Cir. 1970) (per curiam).[10]

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[10] We do not understand why counsel for the appellant, who is frequently appointed for the first time during the appellate stage to represent *pro se* litigants, has not initially sought a remand in this proceeding in order to enable the district court to consider the revised claims of this *pro se* litigant. Indeed, this was substantially the procedure that was used by this Court in the case of *Smith* v. *United States*, Docket No. 75-2112, in which counsel for Mr. Smith was also The Legal Aid Society and similar claims were made respecting Rule 11. In the *Smith* case the appeal was withdrawn, without prejudice to renewal, without objection by the Government and the case was returned to the district court. Of course, there would be no objection to a similar withdrawal and return in this case in order properly to structure, at the district court level, the issues which are eventually to be presented for review by this Court. Although The Legal Aid Society, Criminal Defense Division, declined on July 7, 1975 to accept appellant's case (A 77), it seems reasonable to assume, in the light of appellate counsel's diligence, that the Criminal Defense Division would represent appellant in the district court.

POINT II

The appellant's plea of guilty complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

A. The plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea.

On September 2, 1971, when Kloner appeared before the Honorable Leo F. Rayfiel in the United States District Court for the Eastern District of New York to change his plea from not guilty on both counts of the outstanding indictment to guilty with respect to Count Two, Rule 11 of the Federal Rules of Criminal Procedure read in its pertinent part as follows:

> ". . . The court . . . shall not accept [a plea of guilty] without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Fed. R. Crim. P. 11 [*as amended* July 1, 1966].

The colloquy at that time among Judge Rayfiel, Kloner, his attorney and the Assistant United States Attorney (Anthony Accetta, Esq.) adequately met the standards under Rule 11. Judge Rayfiel clearly addressed the appellant personally throughout the proceeding. *See McCarthy* v. *United States*, *supra*, 394 U.S. at 464-66. He inquired of Kloner in some detail in order to satisfy himself that the plea was voluntary. To the Court's question whether any promises or threats had been made or any duress used in inducing the plea, Kloner responded, "No, sir" (P 5). The appellant explicitly affirmed that the plea was entirely

voluntary on his part (*Id.*). Noticing that he had been looking at his attorney during the questioning, Judge Rayfiel asked Kloner whether he had understood what had been said to him and once again inquired whether the plea was voluntary; the appellant again responded affirmatively (*Id.*).

It is clear that the appellant understood the nature of the charge, which as Judge Rayfiel later stated at the time of sentencing was a far less serious crime than he could have been convicted of (S 4-5). Judge Rayfiel read aloud to Kloner the count of the indictment to which he was pleading (P 3-4). The language of that count is clear and unambiguous and was certainly intelligible to a 31-year-old person whose schooling had carried him through one year of college (P 3-4, 6).

The Court also advised Kloner of the consequences of his plea. The maximum sentence which could be imposed was discussed and Judge Rayfiel told Kloner that he had a right to a trial before a jury and to have witnesses appear and testify in his behalf (P 4-5). Kloner affirmed that he understood those rights (P 4).

Counsel for Kloner now argues in this Court that the plea of guilty was constitutionally defective because Judge Rayfiel did not advise Kloner of *all* of the rights which he waived by entering such plea (Br. 14-15). Such a view, however, misreads the requirements set forth in the Supreme Court's decision in *McCarthy* v. *United States*, *supra*. It must be kept in mind that the Court in *McCarthy* explicitly rested its holdings upon its supervisory powers over the lower federal courts rather than upon constitutional grounds. 394 U.S. at 464. In fact, the Court in *McCarthy* was at pains to point out that "[t]he nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any general guidelines other than those expressed in the Rule itself." *Id.* at 467 n. 20. "Reality" rather than "ritual" should control. *Id.*

In cases subsequent to *McCarthy*, this Court has similarly taken the position that a determination of whether the defendant understood the nature of the charge at the time of entering a plea of guilty must necessarily vary from case to case. *Seiller* v. *United States*, — F.2d — (2d Cir. slip op. 6509, 6525-26; (decided Dec. 1, 1975); *Irizarry* v. *United States*, 508 F.2d 960, 965 n. 4 (2d Cir. 1975). Moreover, it has been held in numerous cases in this and other circuits that the proceeding at which a plea is accepted must be looked at as a whole; compliance with the strictures of Rule 11 is not a rigid, mechanical process and failure to advise a defendant of one or more particular rights does not in and of itself warrant remedial action. *Wilkins* v. *Erickson*, 505 F.2d 761, 763 (9th Cir. 1974); *Todd* v. *Lockhart*, 490 F.2d 626, 628 n.1 (8th Cir. 1974); *Lockett* v. *Henderson*, 484 F.2d 62 (5th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974); *Eagle Thunder* v. *United States*, 477 F.2d 1326 (8th Cir.), *cert. denied*, 414 U.S. 373 (1973); *United States ex rel. Montgomery* v. *Illinois*, 473 F.2d 1382 (7th Cir. 1973); *Stinson* v. *Turner*, 473 F.2d 913, 914-15 (10th Cir. 1973); *Davis* v. *United States*, 470 F.2d 1128, 1132 (3d Cir. 1972); *Sappington* v. *United States*, 468 F.2d 1378 (8th Cir.), *cert. denied*, 411 U.S. 970 (1973); *Wade* v. *Coiner*, 468 F.2d 1059, 1061 (4th Cir. 1972); *X* v. *United States*, 454 F.2d 255, 261 (2d Cir. 1971), *cert. denied*, 406 U.S. 961 (1972); *United States* v. *Frontero*, 452 F.2d 406, 413-15 (5th Cir. 1971). *See United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844, 845 n. 1 (2d Cir. 1975); *Irizarry* v. *United States*, *supra*, 508 F.2d at 968 n. 9; *Korenfeld* v. *United States*, 451 F.2d 770, 773 (2d Cir. 1971). The words of the Court in *Sappington* must be kept in mind:

> ". . . 'Rule 11 proceedings are not an exercise in futility. The plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same.' Belated, indeed, are the charges here made. Although the petitioner moved for a reduction of sentence within two months after

sentencing, upon various grounds, it was some three years after sentencing that the matters now before us were urged. . . .

Under *McCarthy*, and Rule 11, the inquiry made of the defendant will in each case depend upon the complexity of the charge as well as all of the surrounding circumstances, including the age and record of the defendant, his representation or lack thereof by counsel. . . . Here the charge was a simple one, the defendant was represented by counsel, and the defendant was no stranger to the judicial process. The effort made on this motion . . . is to transform an enunciation of general standards to an ever-lengthening list of specifics, the omission of any one of which will render the entire proceedings 'an exercise in futility.'

But *McCarthy* imposes no requirement that the Judge mount the bench with a script in his hand. Nor does it impose a requirement . . . that the court follow an exact ritual, or that, in order to convey an understanding of the 'nature of the charge' to the defendant, it is necessary to explain the 'elements' of the offense. . . . It is essential that there be substantial compliance with Rule 11. . . ." 468 F.2d at 1379-1380.

Also in this respect language by the Fifth Circuit in *Frontero* is directly in point here:

"Kelly argues that he was not informed of his constitutional rights waived as a consequence of his guilty plea. The colloquy between Kelly and the district judge reveals the fact that Kelly was informed of his right to a jury trial. This, Kelly argues, was not enough. He claims that he should have been informed that his plea constituted a waiver of his right to confront his accusers and

his privilege against compulsory self-incrimination. *This Court is, however, aware of no precedent, from the Supreme Court or elsewhere, for the proposition that due process requires that a defendant be informed of each and every right which is waived by a guilty plea or that the waiver of these rights is a 'consequence', within the meaning of Rule 11, of which a defendant must be personally informed before a guilty plea may be accepted.* Carrying Kelly's argument to its logical conclusion, the Court, before accepting a guilty plea, would be required to inform a defendant of his right to a speedy and public trial, his right to an impartial jury, his right to compulsory process for obtaining witnesses, his right to be free from cruel and unusual punishment, his right to be free from unreasonable searches and seizures, his right to have excluded from the trial any evidence illegally seized, and many more. We do not read Rule 11 as requiring this; nor do we feel that due process requires this." 452 F.2d at 415 (emphasis added).

It is clear from the above that on the basis of the relevant criteria, the appellant's plea was both voluntary and knowledgeable as to the nature of the charge and the consequences of the plea.

B. There was a factual basis for the plea.

To satisfy himself that there was a factual basis, at the time the plea was accepted Judge Rayfiel inquired of Kloner whether he had committed the act (P 7). Kloner answered that he had and stated that he had made a confession to the FBI (*Id.*). His attorney emphasized that a full confession had been given (*Id.*). From that admission, taken together with the simple charge that had been read to Kloner, Judge Rayfiel properly was satisfied that a factual basis existed for the plea.

The Seventh Circuit has found in a case in which the record was not nearly so complete as in the instant case that a factual basis for the plea had been established. *Bachner* v. *United States*, 517 F.2d 589, 593 (7th Cir. 1975). In that case at the plea hearing the judge only summarized the charges contained in the indictment and merely asked Bachner if he understood those charges, to which Bachner answered that he did. *Id.* The judge then asked, "Did you do the things that you are charged with doing in these three counts?" and Bachner answered, "Yes, your Honor." *Id.* Along the same line, this Court has recently stated, albeit in a case in which the colloquy at the time of pleading was more extensive than in the instant case (but in which the defendant's responses were somewhat ambiguous as to his knowledge and guilt), that "the reading of the offenses charged in the indictment, coupled with a defendant's admission that he committed the offenses charged, may provide a sufficient factual basis for a guilty plea where the charge is straightforward and the elements of the crime are clearly set out." *Seiller* v. *United States*, *supra*, slip op. at 6529.

This is not a case like *United States* v. *Steele*, 413 F.2d 967 (2d Cir. 1969), where the Clerk of the court before which the plea was entered simply read the relevant count of the indictment. Moreover, in *Steele* more than one defendant was charged, a situation which obviously calls for more extensive questioning by the judge to establish separately that the guilt of the particular defendant before him is not being mistakenly inferred from the acts of others. *Id.* at 969. To the extent that *Steele* might be argued to hold that reading the indictment and obtaining the defendant's admission that he committed the acts charged therein can *never* constitute an adequate factual basis for the plea, this Court has made clear that such is not the case. *Irizarry* v. *United States*, *supra*, 508 F.2d at 968 n. 9; *cf. Paradiso* v. *United States*, 482 F.2d 409, 413-16 (3d Cir. 1973).

From the foregoing, we believe it is clear that an adequate factual basis for Kloner's plea of guilty had been established at the time of the plea. In the event however, that this Court should reject such a conclusion, we urge that it is appropriate to consider, on this issue, the contents of Kloner's confession as well as the proceedings at Kloner's sentencing in November of 1971.

We recognize the recent statement by this Court in *United States* v. *Irizarry*, *supra*, 508 F.2d at 967 n. 7, to the effect that the facts supporting the plea must be established at the time the plea is taken and that reference to the sentencing proceedings are no substitute for requiring the Court to ascertain that there is a factual basis at the time of the plea. Moreover, we also recognize that Judge Timbers' willingness to incorporate the contents of a telex message sent by the defendant Seiller, which was referred to at the time of Seiller's plea, but apparently not produced before the Court, was rejected (so it appears) by the majority in that case. *Seiller* v. *United States*, *supra*, slip op. at 6531 n. 13. We urge however, for reasons more fully advanced hereinafter (*infra*, Point III) that inquiry on collateral proceedings into the validity of long standing pleas of guilty should not be restricted simply to what occurred at the time of the plea. There is no reason, in those cases, not to adhere to the clear language of Rule 11 which provides: "The Court should not enter a *judgment* upon a plea of guilty unless it is satisfied that there is a factual basis for the plea" (emphasis added).[11]

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[11] The current provisions of Rule 11 (effective December 1, 1975) provides in subdivision (f) as follows:

> (f) *Determining Accuracy of Plea.* Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

In *X* v. *United States*, *supra*, 454 F.2d at 258, this Court expressly recognized that the Court in *McCarthy* v. *United States*, *supra*, "apparently went beyond the specific language of [Rule 11] in requiring that the plea judge assure himself of the factual basis for the charge." Thus, in *X* v. *United States*, when this Court was faced with reaching its own interpretation to Rule 11, it had no difficulty in borrowing such factual elements as had been established at the time of sentencing in order to preserve a plea for which an adequate factual basis had not been established at the time of the plea. Of course, in *X* v. *United States*, this Court, for reasons which are not pertinent here, did not feel bound by the dictum in the *McCarthy* case as to when, in point of time, a factual basis had to be established. A comparison of the facts in *McCarthy* with the facts in this case readily show that there is no reason to conclude that (1) the Supreme Court was mindful of the implications of its apparent amendment to Rule 11, and (2) in any event there is no reason to suppose that the Supreme Court would have excluded evidence of a factual basis for McCarthy's plea had it been established at the time of sentencing. Indeed, in *McCarthy* at no time did the defendant, at the plea, show any meaningful awareness of the nature of the charges against him or that he had possessed the criminal intent requisite to acknowledging his guilt. At the sentencing proceedings, in contrast to appellant Kloner's affirmance of his crime, McCarthy backed off from the minimal plea of guilt which he had entered weeks before. In fact, McCarthy sought, in effect, to withdraw his plea of guilty. In this case, however, Kloner reaffirmed his personal belief in his own guilt as well as those facts which objectively supported a finding of guilt.[12] Under these circumstances

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[12] At the time of sentencing Kloner's attorney described in Kloner's unprotesting presence how his client "went out with a toy pistol and held up this loan association in his own car and was apprehended two or three hours later and they [*sic*] all got their money back." Kloner, speaking for himself, referred to his use of a plastitc toy pistol (S 5).

we can see no reason automatically to apply the dictum in *McCarthy* which seemingly was carried forward in the *Irizarry* case.[13] Moreover, this is certainly an appropriate case in which to consider the statements appellant made in his confession (A 82-83). At the plea Kloner specifically referred to that confession and he has never repudiated it. Accordingly, it would be utterly formalistic to ignore its contents, particularly where, even after the conviction, Kloner reaffirmed that he had, in fact, committed the robbery (A 79).

POINT III

The appellant has failed at this late date to meet the burden required for withdrawal of his plea pursuant to Title 28, United States Code, Section 2255.

A. The appellant has not demonstrated "a fundamental defect which inherently results in a complete miscarriage of justice" or "exceptional circumstances" required for relief under 28 U.S.C. § 2255.

We have argued above (Point II, *supra*) that the plea in this case met the standards enunciated in *McCarthy* v. *United States*, *supra*. We here argue further, however, that the test for allowing withdrawal of a plea of guilty, by collateral attack under 28 U.S.C. § 2255 is, and should be, more stringent than that set forth in *McCarthy*.

The *McCarthy* case arose on a direct appeal from a denial of a motion to withdraw a guilty plea. 394 U.S. at 464. The Court of course did not consider in that case whether the principles therein set forth were to apply also

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[13] There was no claim made in *Irizarry* that the sentencing proceedings provided additional support to a finding that Irizarry had committed criminal acts.

in collateral proceedings. However, the *McCarthy* court was undoubtedly aware that it had several years earlier held that "failure to follow the formal requirements of Rule 32(a) [of the Federal Rules of Criminal Procedure] is not of itself an error that can be raised by collateral attack. . . ." *Hill* v. *United States*, 368 U.S. 424, 426 (1962);[14] *accord*, *Machibroda* v. *United States*, 368 U.S. 487, 489 (1962). The Court in *Hill* went on to suggest that the standard for the granting of motions brought under 28 U.S.C. § 2255 with respect to errors which were not of jurisdictional or substantial constitutional proportions should be whether the claimed error of law amounted to "a fundamental defect which inherently results in a complete miscarriage of justice" and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." 368 U.S. at 428.

The Supreme Court, in a case subsequent to *McCarthy*, restated this view of the limited availability of collateral relief, quoting the above words from its decision in *Hill* and implying that such principle applied generally to any rule of criminal procedure where the error was technical. *Davis* v. *United States*, 417 U.S. 333, 346 (1974). Reading *McCarthy* (which was specifically grounded upon the Supreme Court's supervisory powers rather than on a constitutional or statutory basis) in light of *Hill* and *Davis* suggests that, even upon a showing of non-compliance with Rule 11, the remedy of plea withdrawal, while possibly

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[14] *Hill* involved the failure by the District Court to permit the defendant to speak on his own behalf prior to the imposition of sentence, as required by Rule 32(a) of the Federal Rules of Criminal Procedure. The Justices had earlier agreed, *Green* v. *United States*, 365 U.S. 301 (1961), that the right was an ancient and valuable one indisputably and mandatorily preserved by Rule 32(a)—indeed, one might suggest, at least as valuable as the right Kloner claims here.

appropriate on direct appeal, would not necessarily be allowed where the claim was made by way of collateral attack. Certainly nothing in *McCarthy* suggests that the prophylactic remedy there expounded is automatically available under Section 2255 or that any manner or degree of non-compliance with Rule 11 should be sufficient grounds for relief under that section.[15]

The conditions suggested in *Hill* and *Davis*, *supra*, for granting relief under Section 2255 have been adopted by the Seventh Circuit with respect to claims based upon alleged violations of the Rule 11 standards set forth in *McCarthy*, and appear to be gaining favor in other circuits during the relatively short time in which this question has been faced since *Davis* was decided in 1974. *Bachner* v. *United States*, *supra*, 517 F.2d at 591-93; *Gates* v. *United States*, 515 F.2d 73, 78-81 (7th Cir. 1975); *Arias* v. *United States*, 484 F.2d 577, 579 (7th Cir. 1973) (Stevens, *C.J.*), *cert. denied*, 418 U.S. 905 (1974); *United States* v. *Smith*, 440 F.2d 521, 527-29 (7th Cir. 1971) (Stevens, *C.J.*, dissenting); *cf. Sappington* v. *United States*, 523 F.2d 858, 860 (8th Cir. 1975) (*Webster*, *C.J.*, concurring); *Limon-Gonzalez* v. *United States*, 499 F.2d 936, 937-38 (5th Cir. 1974). Particularly relevant in this respect are the pre-*Davis* views of Circuit Judge Stevens (now a United States Supreme Court Justice) in his dissenting opinion in *United States* v. *Smith*, *supra*, which became the prevailing view in the Seventh Circuit:

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[15] The Supreme Court has not as yet directly qualified the *McCarthy* rule in a case under 28 U.S.C. § 2255. In *Halliday* v. *United States*, 394 U.S. 831 (1969), the petitioner did present a challenge to a guilty plea by way of collateral attack, but since the Court held in that case that the rule it had announced in *McCarthy* would not be applied retroactively (to pleas entered before April 2, 1969), it was not called upon to decide whether *McCarthy* should be extended in its pristine form to claims under Section 2255.

". . . The [collateral] attack must fail unless the alleged error is constitutional or jurisdictional. . . . No jurisdictional issue is raised. In my opinion, the omission of which appellant complains is not of constitutional significance.

A possible violation of the Federal Rules of Criminal Procedure would not, in itself, be sufficient to support a collateral attack on a final judgment pursuant to 28 U.S.C. § 2255. Under Rule 32(d), prior to the imposition of sentence the district court has broad discretion to permit an accused to withdraw a guilty plea. Whether withdrawal is permitted or denied, the exercise of that discretion will seldom be reversed on appeal. . . . After sentencing the plea may be withdrawn only on grounds of 'manifest injustice'. . . . Finally, a departure from the procedures required by Rule 11 may be error requiring reversal on direct appeal [citing *McCarthy, supra*], but does not necessarily raise any question of constitutional significance. [citing *Halliday, supra*].

The 1966 amendment to Rule 11 obviously could not amend the Constitution. Nor was it intended to broaden the avenues of collateral attack on guilty plea convictions. On the contrary, a major purpose of the amendment was to foreclose such attacks by requiring the record to disclose the voluntary character of the defendant's waiver of trial and the trustworthiness of his admission of guilt. . . . Cases interpreting the 1966 amendment do not answer the constitutional question raised by appellant's collateral attack on his guilty plea. . . .

The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. Every inroad on the concept of finality undermines

> confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." 440 F.2d at 527-29.

The standard for granting motions under Section 2255 has a long history in this Circuit. In *United States* v. *Sobell*, 314 F.2d 314, 323 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963), the Court stated that relief under that section is available only if the petitioner "has shown

> (1) a significant denial of a constitutional right, even though he could have raised the point on appeal and there was no sufficient reason for not doing so . . .; or
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> (2) a defect seriously affecting his trial, even though not of constitutional magnitude, if it was not correctible on appeal or there were 'exceptional circumstances' excusing the failure to appeal . . ." [citing, *inter alia*, *Hill* v. *United States*, *supra*].

See also United States v. *Coke*, 404 F.2d 836, 846-47 (2d Cir. 1968) (en banc); *see generally Houser* v. *United States*, 508 F.2d 509 (8th Cir. 1974). Subsequent to the Supreme Court's 1974 pronouncements in *Davis*, this Circuit has restated and confirmed the *Sobel* test. *United States* v. *Wright*, 524 F.2d 1100 (2d Cir. 1975); *Natarelli* v. *United States*, *supra*, 516 F.2d at 152 n.4; *United States* v. *Travers*, 514 F.2d 1171, 1176 (2d Cir. 1974).

It is true that there have been cases in this Circuit, even subsequent to the Supreme Court's 1974 decision in *Davis*, in which relief has been granted by way of collateral attack upon pleas of guilty. *E.g. Seiller* v. *United States*, *supra*; *Ferguson* v. *United States*, *supra*; *Rizzo* v. *United States*, 516 F.2d 789 (2d Cir. 1975); *Irizarry* v. *United States*, *supra*; *compare United States* v. *Welton*, *supra*, 439 F.2d at 826. However, in none of these cases did the Court focus upon the procedural means by which the relief was sought.[16] But in his concurring opinion in *Manley* v. *United States*, 432 F.2d 1241, 1247 (2d Cir. 1970), Judge Friendly did discuss this issue (prior to *Davis*), pointing out that "violation of a Rule of Criminal Procedure, without more, is an insufficient basis for relief *under § 2255* [citing *Hill*, *supra*]" (emphasis in original). More recently, this Court's decision in *United States* v. *Travers*, *supra*, recognized the impact of *Davis* and indicated that the scope of claims by way of collateral attack should be limited by that case and by *Hill*. 514 F.2d at 1178.

Simply stated, our argument here is that the automatic reversal rule of *McCarthy* should apply only to claims arising on direct appeal. In cases arising under Section 2255, we urge that the *McCarthy* test should be applied in light of the views enunciated in *Hill* and *Davis*, *supra;* the plea should not be vacated unless it can be shown that in the plea procedure there was "a fundamental defect which inherently results in a complete miscarriage of justice" or "exceptional circumstances where the need for the remedy afforded by the writ of habeas

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[16] But note that in *Seiller* the Court explicitly stated that it was expressing no opinion on the question whether relief should have been barred because the defendant failed to press his claim by direct appeal, inasmuch as the Government had not raised the issue in its brief. Slip op. at 6522 n.9.

corpus is apparent." 368 U.S. at 428. By this we do not go so far as to suggest that *no* violation of Rule 11 is cognizable under 28 U.S.C. § 2255 unless it rises to the level of a deprivation of constitutional rights.[17] We maintain only that such claim must be at least of a gravity meeting the standards held necessary in *Hill* and *Davis*, *supra*.

Given the circumstances surrounding the taking of Kloner's guilty plea before Judge Rayfiel, we submit that, even if the procedural safeguards of *McCarthy* were *not* fully met (although we have of course argued in Point II that they *were* fully met), the plea was not *constitutionally* deficient, and taken as a whole, did not contravene the principles of *Hill* and *Davis*, *supra*. In his brief to this Court (Br. at 12) Kloner would overcome all of this argument by claiming that the failure of the District Court Judge to advise him at the time of his plea of *all* of the constitutional and other rights which he waived by entering such plea elevates his claim to a constitutional level commanding relief under Section 2255. We have argued (Point II, *supra*, pp. 11-15) that discussion of *all* of the rights waived at the time of entering a guilty plea is not required under Rule 11 and that failure to do so does not amount to deprivation of constitutional due process. If such is the case, Kloner cannot bootstrap his Section 2255 application by means of such a claim. This is particularly so where the case upon which the appellant relies (*McCarthy* v. *United States*, *supra*) was itself explicitly a non-constitutional decision. 394 U.S. at 464.

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[17] Such would be the case when a guilty plea is produced by promises or threats or is otherwise not "intelligent" or "voluntary". *Brady* v. *United States*, 397 U.S. 742, 747 (1970); *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *McCarthy* v. *United States*, *supra*, 394 U.S. at 466; *Machibroda* v. *United States*, *supra*, 368 U.S. at 493.

Finally, we can see no significant reason to distinguish, so far as the availability of post-conviction collateral relief is concerned, between defendants who have pleaded guilty and defendants who, contesting their guilt, have gone to trial. This is particularly so in comparing the standards employed in those cases where a defendant seeks a new trial upon grounds of newly discovered evidence, *see, e.g., United States* v. *Franzese*, 575 F.2d 27 (2d Cir. 1975), with those cases in which a defendant seeks the opportunity to replead and presumably have a trial for the first time, when his sole claim of error concerns the factual basis for the plea. In the former situation, a defendant seeking a new trial more than two years following final judgment (Rule 33, Fed. R. Crim. P.) must show, at a minimum, that a new trial would produce a different result. Indeed, the standard with respect to motions under Rule 33 is that "new evidence will not entitle the defendant to a new trial unless 'it would probably produce a different verdict' ". *United States* v. *Stofsky*, — F.2d — (2d Cir. slip op. 515, 524; decided Nov. 7, 1975) (quoting from *Berry* v. *Georgia*, 10 Ga. 511, 527 (1851)). Moreover, a defendant seeking a new trial on grounds of newly discovered evidence must satisfy the court that he could not, with due diligence, have timely uncovered the evidence. *See United States* v. *Zane*, 507 F.2d 346 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Against those standards, it makes little sense to vacate pleas of guilty where a defendant makes no allegation of innocence or where, even in the face of such an allegation, reliable evidence shows the assertion to be unsupportable in that the defendant had, outside the presence of the court, confirmed a factual basis for the plea.[18]

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[18] We note again (Point I, *supra*) that one cannot be certain that that appellant, though he desperately wants to be released from prison, wishes to see his plea vacated or, for that matter, contests the factual basis for that plea. Thus, given the fact that his motion below was to vacate his "sentence" (A 37) and

[Footnote continued on following page]

B. The appellant's failure to raise his present claim by way of motion to withdraw or direct appeal forecloses its assertion now by collateral attack under 28 U.S.C. § 2255.

The availability of relief under Section 2255 for claims which could or should have been made by way of direct appeal has been the subject of much controversy. *Compare Kaufman* v. *United States*, 394 U.S. 217, 222-24 (1969) *with Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973) (concurring opinion of Mr. Justice Blackmun) *and* 412 U.S. at 250-75 (concurring opinion of Mr. Justice Powell, Mr. Chief Justice Burger and Mr. Justice Rehnquist). However, even subsequent to the *Kaufman* decision, the rule remains that a motion under Section 2255 cannot be used in lieu of a direct appeal, at least where only non-constitutional claims are raised. 394 U.S. at 223 n.7; *Sunal* v. *Large*, 332 U.S. 174, 179 (1947); *Houser* v. *United States*, *supra*, 508 F.2d at 513-14. This Circuit has followed such rule from the time of *Sobell*, *supra*, except in the limited situation where the claim goes to the illegality of the sentence itself and thus could have been brought in any event under Rule 35 of the Federal Rules of Criminal Procedure. *United States* v. *Travers*, *supra*, 514 F.2d at 1176-77; *compare United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974) *and United States* v. *Gordon*, 433 F.2d 313 (2d Cir. 1970) (per curiam) *with Natarelli* v. *United States*, *supra*, 516 F.2d at 152 n.4 *and Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972) (per curiam). Judge Friendly stated the proposition succinctly for this Court in *Travers* by noting that where non-constitutional claims are involved "collateral relief

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that his lengthiest communication to this Court barely mentioned the so-called "Motion to Vacate Sentence" (and, at that, he dwelt solely upon a claim concerning the sentence) it is likely that he does not contest the plea proceedings.

will rarely be accorded to those who, *even for apparently good reasons*, did not exhaust the possibilities of direct review". 514 F.2d at 1177 (emphasis added); *see also United States* v. *Wright*, *supra*.[19]

The reasons that failure to take a direct appeal should foreclose collateral relief are obvious and require little elaboration beyond what Judge Friendly said in *Sobell*, *supra*:

> "There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause 'litigation in these criminal cases [to] be interminable' . . . but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. If the point on which Sobell now relies had been raised and sustained on appeal, that would on no account have led to a direction for acquittal. Even under all the elaborate safeguards with which this country properly surrounds those charged with crime, it would have

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[19] Recent decisions suggest that the restriction on assertion under Section 2255 even of constitutional claims which might have been raised on direct appeal may be nearly as stringent as for non-constitutional claims. *Davis* v. *United States*, 411 U.S. 233, 239-42 (1973); *Kaufman* v. *United States*, *supra*, 394 U.S. at 227 n.8; *United States* v. *Wright*, *supra*, 524 F.2d at 1100; *United States* v. *Gordon*, *supra*; *cf. Seiller* v. *United States*, *supra*, slip op. at 6522 n.9.

> led only to a new trial, in which it seems unlikely that the result as to any of the defendants would have differed. When a claim is raised upon direct appeal as this could have been, and is there sustained, a new trial can be had seasonably, when witnesses are still available and their recollections still fresh. In contrast, collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts." 314 F.2d at 324-25.

The problems faced by the Government in attempting now to try Kloner more than five years after the events with which he was charged would of course be formidable. *See United States* v. *DeCavalcante*, 449 F.2d 139, 141 (3d Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). Judge Friendly set forth the difficulties in clear fashion when he wrote concerning Section 2255 motions:

> ". . . [A]lthough successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only. Inability to try the prisoner is even more likely in the case of collateral attack on convictions after guilty pleas, since there will be no transcript of testimony of witnesses who are no longer available." [20]

While such burdens cannot of course be of themselves determinative of the rights of defendants, they do argue forcefully that the criteria for review by way of collateral attack years after the fact can and should be more restricted than review upon direct appeal. To refuse to allow by collateral attack those non-constitutional claims

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[20] *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970) (footnotes omitted).
~~omitted).~~

which could have been raised by direct appeal but were not is hardly a harsh constraint. Since the overwhelming majority of criminal convictions are obtained by plea of guilty,[21] a contrary holding with respect to claims of violations of Rule 11 in plea proceedings would seem to invite opening the floodgates to post-conviction litigation. *See McCarthy* v. *United States, supra,* 394 U.S. at 463 n.7.

Kloner argues that he should not be barred now from relief by collateral attack because he did not make a "knowing and intentional waiver of his right to take a direct appeal" (Br. 12-13). Furthermore, he argues that the district court was required to advise him of that right and failed to do so and his then attorney failed to tell him he had such right (Br. 13). But this argument and the cases cited by Kloner in its support overlook the fact the case at bar involves a plea of guilty rather than the verdict of a judge or jury. It is true (as Kloner points out on page 11 of his brief) that violations of Rule 11 may properly be raised on direct appeal, as was done in *McCarthy* and as we argue should have been done here. It is also true that a defendant can seek to withdraw a plea of guilty by motion made either before or after sentencing. Fed. R. Crim. P. 32(d). And it is even possible in limited circumstances (as defined by the *Hill* and *Davis* criteria) to challenge the validity of a plea by resort to 28 U.S.C. § 2255. But ordinarily, as Judge Rayfiel stated below, a defendant cannot raise non-jurisdictional issues on appeal when a conviction is based on a plea of guilty (A 4). *United States* v. *Mari,* 526 F.2d 117, 119 n.1 (2d Cir. 1975). The *substance* (as opposed to the procedure) of the plea cannot be challenged. Thus, it is hardly surprising that Judge Rayfiel did not advise Kloner that he had a right to appeal; in fact, it is more to be expected that District Court judges would advise defendants that their plea of guilty will act as a waiver of appeal rights. After ac-

[21] *Brady* v. *United States, supra,* 397 U.S. at 752 n. 10.

cepting Kloner's plea of guilty, Judge Rayfiel could not have been expected to have advised Kloner that he had a right to appeal that plea on procedural grounds. To require a District Judge to give such advice would be patently absurd; to note that such a rule would of course also apply to virtually every step of the criminal process is to make apparent its illogic.[22]

Kloner's claim that he was not advised by his attorney to his right to appeal (and presumably, as well, his right to move for its withdrawal) stands without legal significance.

We recognize that there is a certain deceptive simplicity in appellant's assertion that "his failure to take a direct appeal did not constitute a waiver" (Br. 12). However, the principles of finality which find expression in the *Kaufman* case and its progeny do not rest upon notions of waiver. Thus, for good reason it is entirely irrelevant as to what advice Kloner may or may have not received from counsel or from the Court. Simply put, a defendant who, following his plea or thereafter immediately following his sentence, finds that he is either dissatisfied with his own state of mind, as ex-

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[22] In fact, of course, a district court judge is required to advise only a defendant who "has gone to trial on a plea of not guilty" of his right to appeal; he is *not* required to advise a defendant of such right after a plea of guilty. Fed R. Crim. P. 32(a)(2). The present language of Rule 32, as amended on December 1, 1975, explicitly states that there is no duty on the court to advise a defendant who pleads guilty of his right to appeal. Accord: Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals, Rule 1(a). *Id.* However, it was clear even before the 1975 amendment that the court had no such duty. *Crow* v. *United States*, 397 F.2d 284, 285 (10th Cir. 1968); *Burton* v. *United States*, 307 F. Supp. 448, 450 (D. Ariz. 1970); *Alaway* v. *United States*, 280 F. Supp. 326, 336 (C.D. Cal. 1968). The policy behind such a principle is equally clear; to require such advice would "merely tend to build false hopes and encourage frivolous appeals." *See* Advisory Committee Note to Proposed 1975 Amendments to Rule 32.

pressed at the plea proceedings, or more realistically, dissatisfied with the sentence (*compare United States* v. *Needles*, 472 F.2d 652, 654 (2d Cir. 1973), will thereby be prompted to take some action in order to withdraw his plea. The *McCarthy* case arises in precisely that context; McCarthy had never in any sense provided a factual basis at the time of the plea and at the sentencing he truly backed off from any previous position he had taken as to his guilt. His eventual appeal from the judgment was a direct outgrowth of his change of mind. Thus, we can legitimately inquire in this case (as an abstract matter) on what ground would Kloner have ever been advised that he had a right to appeal or to withdraw his plea when he never took the significant step of voicing dissatisfaction with the plea. As to the supposed failure of counsel to give appellate advice to Kloner, we wonder on what ground would such advice have been given? On the ground that the plea procedure during which he had just represented his client, and which (making no objection to the procedure) he presumably believed was proper, *might* have been improper? That would be absurd. In short, Kloner, having made no Rule 32(d) motion to withdraw his plea either before or after sentencing and having failed to raise the issue of the validity of his plea by direct appeal, now almost 4½ years later discovers the issue for purposes of collateral attack. Such long delay invites the conclusion that his objection (if it truly is his objection) now is an afterthought.[23]

For all of the reasons aforesaid, we submit that, by failing to challenge the validity of his plea by direct

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[23] Perhaps even less than an afterthought; thus, we find Kloner telling the Legal Aid Society in July, 1975 with respect to the State charges to which he had pleaded guilty: "I am sure that you are aware that I can at any time withdraw my plea" (A. 8). Obviously, appellant is knowledgeable enough to know the difference between a motion to vacate a sentence and one to vacate or withdraw his plea.

appeal, or by timely motion to withdraw, Kloner has foreclosed his right to assert such claim at this late date by means of 28 U.S.C. § 2255.

C. The appellant is not entitled to relief because he raises no claim of innocence.

If either he or his attorney had disputed the validity of the plea, Kloner, either before or after sentencing, could have made a motion before the district court to withdraw that plea. Fed. R. Crim. P. 32(d). Prior to sentencing, the granting of such a motion is within the sound discretion of the district court and is usually freely granted whenever it seems fair and just to do so. *See, e.g., United States* v. *Webster*, 468 F.2d 769 (9th Cir. 1972), *cert. denied*, 410 U.S. 934 (1973); *United States* v. *DeCavalcante*, *supra*. However, after sentence is imposed, the Court may permit the defendant upon motion under Rule 32(d) to withdraw his plea only "to correct manifest injustice". *Paradiso* v. *United States*, *supra*, 482 F.2d at 416. Moreover, at least after sentencing, a defendant seeking to withdraw his plea under Rule 32(d) must at a minimum claim that he was not guilty of the charge to which he pled. *United States* v. *Macklin*, 523 F.2d 193, 196 n.4 (2d Cir. 1975); *D'Allesandro* v. *United States*, 517 F.2d 429, 436 n.7 (2d Cir. 1975) and cases cited therein. It appears that the question of guilt or innocence has not generally been considered controlling in motions for similar relief under 28 U.S.C. § 2255. *See, e.g., Watts* v. *United States*, 278 F.2d 247, 251 (D.C. Cir. 1960). But there is no rational basis for ignoring a person's failure to assert his innocence when he attacks the plea collaterally rather than directly. *See* Friendly, *supra*, n.20.

Kloner makes no allegation in any of his four applications to the district court (nor, apparently, in any of

the blizzard of motions, applications and communications he had addressed to this Court, the District Court, the Office of the United States Attorney, the Department of Probation and the Board of Parole) that he was innocent of the crime to which he pled guilty. The guilt or innocence of the defendant must bear *some* weight in determining whether there has been "a fundamental defect which inherently results in a complete miscarriage of justice" and whether there are "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill* v. *United States, supra*, 368 U.S. at 428.

D. The error, if there was any, in the procedures at the time of the appellant's plea was harmless.

The United States Supreme Court has recognized that criminal trial convictions should not be automatically reversed for harmless errors in the admission or exclusion of evidence. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967); *Rothschild* v. *New York*, 525 F.2d 686 (2d Cir. 1975) (per curiam); *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109, 1113 (2d Cir. 1975). In *Harrington* and *Chapman*, the Court stated that in order to be disregarded a federal constitutional error must be harmless beyond a reasonable doubt. In the case at bar, however, we are confronted only by the requirements of criminal procedure as construed by the Court in its supervisory role rather than as constitutional arbitrator. *McCarthy* v. *United States, supra*, 394 U.S. at 464. *See also* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

This Court has applied the harmless error rule in weighing motions for new trials based upon the Govern-

ment's failure to disclose impeaching evidence. *E.g.*, *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975); *United States* v. *Bonanno*, 430 F.2d 1060, 1063-64 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970). District courts in this circuit have recently found that the harmless error rule could bar relief under Section 2255 for failure to observe the procedural requirements of Rule 11 proceedings. *Aviles* v. *United States*, — F. Supp. —, 75 C 5094 (S.D.N.Y.; decided Oct. 21, 1975, Palmieri, *D.J.*), *aff'd without opinion*, — F.2d — (2d Cir. Jan. 13, 1976), *petition for cert. filed*, (Docket No. 75-6196, Feb. 12, 1976); *Poerio* v. *United States*, — F. Supp. —, 75 C 826 (E.D.N.Y.; decided Sept. 16, 1975, Judd, *D.J.*) (unreported). Surely in the case at bar it can be safely said that had none of the alleged procedural errors at the taking of the plea occurred there would have been no significant difference in the outcome. As Judge Hand wrote long ago: ". . . while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945). In fact, as we have argued above (*see* Point III, A., *supra*), non-constitutional error may be substantially more serious than "harmless" and still not be cognizable under 28 U.S.C. § 2255.

POINT IV

The District Court did not abuse its discretion in denying without hearing the appellant's challenge to the validity of the decision of the Board of Parole revoking his parole.

The appellant asserts that he had and presented at the parole revocation hearing held on February 24, 1975, evidence which refuted the charges upon which the revocation was based. He argues that Judge Rayfiel

denied his motion below attacking such revocation without proper review of the record of that hearing (Br. 3, 20-21). Such argument founders upon two grounds.[24]

First, Kloner's refutation of the charges against him, even if taken as uncontradicted, does not absolve his guilt, at least as to the charge that he left the area of supervision without permission. Kloner merely alleges that, when he informed his parole officer of the trips *after he had returned*, the parole officer said that "he would not be revoked for this item" (A 3). As Judge Rayfiel stated below, "[w]hile [Kloner] argues that his parole officer was aware of the violations, he does not claim that the violations were with the parole officer's permission" (A 2). On that basis, there was sufficient basis for Judge Rayfiel to reject Kloner's challenge to the revocation.

Second, however, Kloner's refutation in fact was *not* uncontradicted at the parole hearing, where his parole officer appeared. Judge Rayfiel, contrary to Kloner's claim in his brief, *did* in fact review the revocation proceedings which had occurred before the Board of Parole.

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[24] The Court below apparently considered Kloner's challenge to the decisions of the Board of Parole without denominating it as to type. 28 U.S.C. § 2255 is generally not available to question decisions involving revocation of parole, and jurisdiction would not lie in the District Court under 28 U.S.C. § 2241 to consider the validity of Kloner's continuing incarceration within the Eastern District of New York unless either he were incarcerated within that district or his custodian were found there. *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *United States* v. *Huss*, 520 F.2d at 603-04, 605-06; *Candarini* v. *Attorney General of the United States*, 369 F. Supp. 1132, 1134 (E.D.N.Y. 1974). Furthermore, whether jurisdiction could be found over a proper respondent in either case or under any other theory of civil jurisdiction, is certainly open to serious question. *United States* v. *Huss*, *supra*, 520 F.2d at 604-06. However, inasmuch as the district court considered and, as we have argued, properly disposed of, Kloner's challenge without considering the threshold question of jurisdiction, we do not press the issue here.

Upon Judge Rayfiel's request, the Office of the United States Attorney obtained from the Board of Parole the administrative file in Kloner's case, which included a summary of the revocation hearing, various administrative appeals and decisions and various correspondence of and to the Board. Because, however, some of the material in that file was disclosed in confidence and was highly sensitive in nature, the Board requested that the district court examine such material in camera and it was submitted to the Court on September 10, 1975 with that request (*Id.*).[25] Thus Judge Rayfiel had adequate evidence before him upon which to reject Kloner's challenge to the decision of the Parole Board, which he did, finding that there was no showing that the Board had abused its broad discretion in such matters. *See Shelton* v. *United States Board of Parole*, 388 F.2d 567, 576 (D.C. Cir. 1967); *Hyser* v. *Reed*, 318 F.2d 225, 234 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).[26]

A hearing was not required inasmuch as "the motion and the files and records of the case conclusively show[ed] that the prisoner [was] entitled to no relief." 28 U.S.C. § 2255; *Dalli* v. *United States*, *supra*; *see Fontaine* v. *United States*, 411 U.S. 213 (1973); *Machibroda* v. *United States*, *supra*, 368 U.S. at 494-96.

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[25] Kloner's appellate counsel was of course not aware that such file had been before the district court at the time of its decision below. By order dated February 20, this Court ordered the contents of the file disclosed to counsel for appellant. We anticipate, therefore, further briefing.

[26] While not relevant to a determination whether the Court below properly denied Kloner's challenge to the decisions of the Board of Parole, it should be noted that by reason of Kloner's two state court convictions entered by pleas of guilty subsequent to the hearing in question, the Board could clearly now move to revoke his parole on that basis alone.

POINT V

The appellant has stated no valid claim against the United States for denial of medical care.

Judge Rayfiel did not address himself in his opinion to the appellant's claims with respect to his health, perhaps because he meant to subsume them under the issue of denial of religious freedom.[27] In fact Kloner makes no specific assertions that he ever requested or was denied any particular care. His complaint seems to be simply that incarceration is bad for him and for his health.

Kloner states in his brief that the Court below should have read these complaints into an action for injunctive relief and damages under 42 U.S.C. § 1983. Laying aside the lack of specificity, this analysis must fail because federal authorities have no control over the Queens House of Detention. The damage (if there be any) was incurred during incarceration at the Queens House of Detention for Men; there is no allegation of inadequate medical treatment at any federal institution.[28] The United States cannot be held to answer in damages for acts of state authorities.

Again, upon the authority set forth in Point IV, *infra*, a hearing was not required.

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[27] Perhaps, alternatively, Judge Rayfiel believed that Kloner was trifling with the Court. Thus, Kloner stated:

> "Due to petitioner's Religious upbringing and beliefs he does not and is not allowed to mastrbate [sic]. Since petitioner has been in prison since January 24, 1975 he has naturally been denied sexual intercourse. At present petitioner suffers from pain in his back, left testicle, and finds it difficult to walk. Further, this could lead to sterility and/or impotency [sic]" (A 25).

[28] Certainly further serious doubts also must exist as to whether "known federal respondents" are present in the case as required under 28 U.S.C. § 1361. *See United States* v. *Huss*, *supra*, 520 F.2d at 604-05; *cf. Kahane* v. *Carlson*, *supra*.

CONCLUSION

The order of the District Court dated September 22, 1975, should be affirmed.

Dated: February 23, 1976

Respectfully submitted,

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Court Index No. Docket #75-2136

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEYMOUR KLONER,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

DAVID G. TRAGER

United States Attorney,
Attorney for USA

596-3417

Due service of a copy of the within is hereby admitted.

New York, February 26, 19 76

The Legal Aid Society
Federal Defender Services Unit

Attorney for Appellant

To By

Attorney for

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